Supreme Court, U. S.
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No. 74-1585

In the Supreme Court of the United States

OCTOBER TERM, 1974

47TH AND STATE CURRENCY EXCHANGE, INC.,
an Illinois corporation,
Plaintiff-Appellant,

vs.

B. COLEMAN CORPORATION, an Illinois corporation,
Defendant-Appellee.

MOTION OF APPELLANTS PURSUANT TO RULE 16 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES TO STRIKE MOTION OF APPELLEE TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS

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Now comes B. Coleman Corporation, an Illinois corporation, Defendant-Appellant by William Henning Rubin its attorney, and moves the court pursuant to Rule 16 of the Rules of the Supreme Court of the United States to Strike from the record the Motion of Appellee to dismiss the Appeal or in the alternative to affirm the judgment of the Supreme Court of Illinois.

That in support of this motion Defendant-Appellant says as follows:

1. That Rule 16 of the Rules of the Supreme Court of the United States specifically provides that the Appellee may file a printed motion to dismiss or motion to affirm within 30 days after receipt of the jurisdictional statement unless the time is enlarged by the court or a justice thereof, etc.

2. That the appeal was docketed in this court on the 16th day of June, 1975 and the motion to dismiss the appeal or to affirm the decision of the Supreme Court of Illinois was filed on the 25th day of August, 1975, without leave of court to enlarge the time within which it might file a motion to strike or to affirm.

That Appellees' motion to dismiss, goes to the merits of the case.

That this court has held in a number of cases that it will not entertain a motion to dismiss where the objection goes to the merits of the case and even to the jurisdiction. *Ill. Cent. Ry.* v. *Wirtz Adams,* 180 U.S. 410, 45 Sup. Ct. L. Ed. 410; also, 21 Sup. Ct. 251.

That Appellees have misrepresented the effect of the decision rendered by the Supreme Court of Illinois as affirming that Appellants are operating as a currency exchange and furthermore that the provisions of the Illinois Community Currency Exchange Act Ch. 16½ Par. 30 Ill. Rev. Stat. restricts Appellants from cashing checks in connection with the issuance of Money Orders, etc.

That an examination of the decision rendered by the Supreme Court of Illinois clearly indicates that the court made no findings; that it rendered no written opinions with the exception that it remanded the case to be tried on the

merits and further determined that the appellate court of Illinois erred in vacating the Temporary Restraining Order of Judge Covelli. That if the Supreme Court had made a determination that appellants were operating contrary to the Community Currency Exchange Act, quite obviously it would have made a determination that the Community Currency Exchange Act *bars* the operations of Appellant. Obviously, the Supreme Court could not do this since there was no evidentiary hearing, no evidence was presented and the entire proceeding commenced by the *illegal* issuance of a temporary injunction order without notice and without bond on the misrepresentation of plaintiff-appellee, that defendant-appellant was operating a currency exchange. The Chancellor Judge Covelli relied on the false affidavits of the Appellee that Appellant was operating a currency exchange without a license. That appellee's counsel on page two and three of its Motion to Dismiss attempts to justify the original issuance of the Ex Parte Injunction by stating that it was done on affidavit or verified complaint. On page three counsel says: "an injunction can only be granted by a judge and a bond is always required of private litigant. Ill. Rev. Stat., 1973, Ch. 69, Section 9. However, counsel ignores the fact that Appellee never posted a bond and it was only after Appellant moved to vacate the temporary injunction order that, an order was entered vacating the temporary injunction order, Appellee was required to post a bond and then only a *Temporary Restraining Order was issued,* and the amount of an Appeal Bond set at $1,000.00.

That the examination of the brief of Appellant further reflects that Appellants perfected an appeal pursuant to 28 U.S.C., Sec. 1257 from the order entered on the 29th day of January 1975 vacating the Stay Order of the appellate court for the First District and from the order entered

May 14, 1975 denying Appellant's Motion to Recall the Mandate issued April 4, 1975 and to correct the language of the mandate to conform to the Order of January 29, 1975, pursuant to Ill. Rev. Stat. 1971, Ch. 69, Sec. 3, and 3-1 that the duration of a temporary Restraining Order is only 10 days.

If the Supreme Court of Illinois was of the opinion that the business conducted by Appellant was contrary to the law, it would not have remanded the case to be heard on the merits. Under these circumstances the issuance of a temporary restraining order cannot possibly be construed to imply a temporary injunction which would cause appellant to entirely suspend their operations and cease doing business.

This is especially true since the language of the Sale of Exchange Act specifically recites that until the passage of that Act the sellers of exchange at multi-locations (sellers of Travelers Express money orders and American Express travelers checks) were not regulated.

Appellee's forcing appellant into a "squeeze play" operation by obtaining a temporary injunction, which was subsequently vacated, and a temporary restraining order, was never the intention of the framers of the injunction act and the State of Illinois. Appellants are entitled to relief against such oppressive conduct and a court decision that in effect overrules all the previous decisions or temporary restraining orders.

That Appellees do not deny that there has been no decision in the State of Illinois rendered that the duration of a temporary Restraining Order extends beyond the period of ten days and that it does not automatically die or cease to have any effect at the end of the ten day period unless there is language to the contrary.

That is the entire basis for appeal to this court is not a determination as to whether or not the Community Currency Exchange Act is valid, is constitutional, is unconstitutional, or a restriction of Interstate Commerce or whether the Sale of Exchange Act covering the Sale of Exchange at multi locations is governed by the Community Currency Exchange Act or stands on its own feet. (Sale of Exchange Act specifically recites that until its passage there was no control of the issuers of exchange at multi locations.) In confirmation of appellant's contentions (See Affidavit of Appellant Attorney).

The attorney for the Appellant was the draftsman of the temporary Restraining Order, and the only reason that no time limit was inserted was Counsel for Appellant was aware of the provisions of Chapter 66, Ill. Rev. Stat. 1971, Sec. 3, and 3-1, the Injunction Act of the State of Illinois. That the attorney for the Appellant being in practice for over 37 years relied on the provisions of that Act and expected that in accordance with the case law of the State of Illinois there was no possibility of the *temporary restraining* order becoming a *temporary injunction.*

That counsel for the Appellee completely ignores the case law covering temporary restraining orders pursuant to the provisions of the 1967 revision of the Injunction Act, Ill. Rev. Stat. 1971, Ch. 69, Sec. 3 and 3-1.

Counsel for Appellants has heretofore cited the following cases:

Paddington Corp. v. *Foremost Sales, Inc.,* 13 Ill. App. 3rd 175.

Bohn Aluminum & Brass Co. v. *Barker,* 3 Ill. App. 3d 600 (1972).

Buckingham Corp. v. *Vesolowski,* 17 Ill. App. 3d 61.

That the situation here is unique in that the Supreme Court of Illinois entered an order on January 29, 1975 (See Appendix 1-a) that the Appellate court erred in granting a stay order and vacated it.

That the clerk of the Supreme Court on the other hand in issuing the mandate inserted the language:

> "Therefore, it is considered by the Court that the issuance of the restraining order by the Circuit Court of Cook County, aforesaid, Reaffirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error, and this cause be remanded to the Circuit Court of Cook County for a hearing on the merits." (See Appendix 2a and 3a "MOTION TO RECALL MANDATE AND TO CORRECT MANDATE TO CONFORM TO DECISION OF THE COURT.")

That when Appellant found that the clerk of the Supreme Court had taken it upon himself to construe the language of the Court Order of January 29, 1975 when the mandate was issued it was necessary as well as advisable to file the *Motion to Recall the Mandate* and to correct the language of the mandate to conform to the decision of the court rendered January 29, 1975.

That in support of this argument to modify the language contained in the mandate to conform to the decision of the Illinois Supreme court rendered January 29, 1975 the affidavit of appellant's counsel is hereto attached. (see Appendix p. App. 3) The affidavit confirms that counsel for Appellant spoke to Clell Woods, Clerk of the Supreme Court of Illinois and interrogated him as to why the language in the mandate was not the exact language as contained in the order of January 29, 1975. The answer of the clerk was that he assumed that if the stay order of the Appellate Court was issued in error the temporary restraining order was in full force and effect. That if the clerk of the court is to assume a position of authority to make an interpretation as to the language to be inserted in a mandate it will be a new era in judicial circles of the *clerk vs. the court*. That Appellees are attempting to argue the merits of the case which is barred in a motion to strike and dismiss.

That the Supreme Court of Illinois made no determination as to the merits of Appellant's rights and therefore remanded the cause for *a determination on the merits.* On the other hand if Appellants do not have the protection afforded to them by the provisions of the Injunction Act of the State of Illinois which specifically covers temporary restraining orders and limits the life thereof to ten days it must be admitted that defendants are deprived of their rights under the First and Fourteenth Amendments of the Constitution of the United States.

The rights of the Supreme Court of the United States pursuant to 28 U.S.C. Sec. 1257 to determine the validity of temporary restraining order where it applied a more rigorous standard is the case of *Organization for a Better Austin* v. *O'Keefe,* 402 U.S. 415, 29 L. Ed. 2nd.

That it is the established rule of this Court that a motion to dismiss can not be predicated on the merits of the case, 21 Sup. Ct. 251, 180 U.S. 28, 45 L. Ed. 410, *Illinois Central Railroad* v. *Wirtz Adams,* 45 Sup. Ct. L. Ed. 410, 180 U.S. 410.

That the entire motion of Appellee to dismiss when examined carefully discloses that it is an attempt to evade that well established principle that the *merits of the case can not be discussed in a motion to dismiss.*

That the only purpose of Appellees in filing an untimely motion to dismiss (60 days after Appellants jurisdictional statement) is to get into the record Appellees contention that Appellants are operating a currency exchange.

Appellees can not base their motion to dismiss on contentions since no evidence was presented, no testimony was taken and the court is required to rely on the "bald" statements that Appellees are operating a currency exchange contained in a complaint that was filed without the issuance of summons or notice to Appellants and Appellants only became aware of the proceedings and entry of the original Temporary Injunction Order when the sheriff served the writ.

That Appellees not only attempt to argue the merits of the case but attempt to characterize the operations of Appellants by again making the bald statement in, unsupported by evidence of Appellants' operations, their motion. (p. 15) Appellee can not make this statement since no evidence was adduced and no evidentiary hearing was held.

> "Here, the B. Coleman Corporation is not engaged in the retail sale of merchandise though it belatedly obtained a Retail Occupation Tax Number, and purportedly now is in the business of selling an occasional bicycle at retail."

Appellees are again trying to confuse the issue of the basis of the appeal from the Illinois Supreme Court pursuant to 28 U.S.C. Sec. 1257.

The mandate of the Illinois Supreme Court as it affects Appellants and its effect of modifying the Illinois Injunction Act Ch. 69, Sec. 3 and 3-1 of the Ill. Rev. Stat. 1971 is repugnant to the due process clause of the Constitution of the United States placing Appellants in extreme jeopardy of going to jail or being fined.

The Injunction statute of the State of Illinois prescribes the rules that govern the issuance of Temporary Restraining orders and no one is required at his peril of life, liberty or property to speculate as to the interpretation of a statute such as the Injunction Act. In *Lanzetta* v. *New Jersey,* 306 U.S. 451, 59 Sup. Ct. 618.

The Injunction statute of the State of Illinois governing Temporary Restraining orders is not *"bad"* it is merely the untimely issuance of "faulty" language in the mandate as the result of the error of the clerk of the Supreme Court assuming that the temporary restraining order was in full force and effect. Appellees have made it a point to avoid discussing the Injunction Act of the State of Illinois which is similar to the provision of the Federal Injunction Act.

The restraining order rests on a disputed question of fact. *Organization for a Better Austin* v. *O'Keefe,* 402 U.S. 415, 29 L. Ed. 2nd.

When a classification touches on a fundamental constitutional right, the constitutionality of the classification must be judged by the stricter standard of whether it promotes a compelling state interest. If it does not, it violates the equal protection clause of the 14th Amendment. *Shapiro* v. *Thompson,* 39 US 618, 638, 22 L. ed. 2d 600—89 Sup. Ct. 1322.

If this Court determines that a petition for certiorari should have been filed in lieu of an appeal, the time for filing a petition to the Supreme Court for a writ of certiorari to review a lower court decision is governed by Rule 22 of the Rules of the Supreme Court:

> "The Supreme Court has said that Rule 22 is not jurisdictional or mandatory and that it may be waived under proper circumstances, at least where no jurisdictional statute is involved."

Durham v. *United States,* 28 L. Ed. 2nd 960.

Appeals to the Supreme Court are a matter of right, while a petition for certiorari is a matter of discretion. *Durham* v. *United States,* 28 L. Ed. 2nd 200. *Mason* v. *Northwestern Mutual Life Ins.,* 106 U.S. 163, 1 Sup. Ct. 165, 27 L. Ed. 129. See *Taglianetti* v *United States,* 22 L. Ed. 302. Time limitation is not jurisdictional.

CONCLUSION

Appellants filed this motion in reply to appellees' motion to dismiss in order that the court may have the proper perspective, since the Appellees base their argument strictly on the question of the merits of the case which is contrary to the rules of this Court. Appellants urge this Court to grant the appeal since it is placed in jeopardy of losing its business and subject to a fine and possibly even a jail sentence if the temporary restraining order is construed to be a permanent injunction.

The fact that the trial court set the appeal bond at $1,000 and directed the appellants to seek a stay order in the Appellate Court, for reasons best known to the trial judge, is more than an indication that the trial court felt it was only a temporary restraining order and not a permanent injunction.

Pursuant to the Injunction Act of the State of Illinois, the trial court was required to hold an evidentiary hearing on the merits of appellants' cause of action. Appellants had filed a motion to strike the proceedings, which was never heard. The fact that the Supreme Court remanded

the case for hearing on the merits further confirms that the Court was not convinced that appellants were acting in violation of the statute of the State of Illinois.

Appellants delayed the filing of the appeal since the Clerk of the Supreme Court of Illinois suggested that a motion be made to recall the mandate and that the mandate conform to the language of the order of the Supreme Court. This made the filing of the notice of appeal to the Supreme Court of the United States a timely filing, pursuant to 28 U.S.C., Section 1257.

In support thereof the Appellants urge this Court to deny Appellees' motion and to grant the appeal.

Respectfully submitted,

WILLIAM HENNING RUBIN
Attorney for
B. Coleman Corporation,
Defendant-Appellant

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Chicago, Illinois 60601
263-6780

APPENDIX

APPENDIX A

MOTION TO RECALL MANDATE AND TO CORRECT MANDATE TO CONFORM TO DECISION OF THE COURT

Now comes B. Coleman Corporation, deefndant-appellee, and moves the Court that the mandate issued by this Court be recalled and that the mandate be revised to conform to the decision of this Court.

That in support of this motion, appellee states as follows:

1. That a decision was rendered by this Court that the Appellate Court erred in granting the Stay Order and the cause was remanded to the Circuit Court for a hearing on the merits.

2. That during oral argument the justices of the Supreme Court suggested that the Appellate Court erred in vacating the restraining order of the Trial Court since it was a temporary restraining order that terminated at the end of the 10-day period.

3. That appellee filed a motion to clarify or reconsider the decision of this Court in order that all the parties and the Trial Court would be further informed as to the basis for the Court's decision, but that motion was denied.

4. That the mandate issued contains the following language:

> "Therefore, it is considered by the Court that the issuance of the restraining order by the Circuit Court of Cook County, aforesaid, Reaffirmed In All Things And Stand In Full Force And Effect, notwithstand-

ing the said matter and things therein assigned for error, and this cause be remanded to the Circuit Court of Cook County for a hearing on the merits."

5. That the failure of the mandate to conform to the order places the appellee in jeopardy.

6. That the language of the mandate is contrary to the case law that a temporary restraining order terminates at the end of the 10-day period.

Wherefore, appellee moves:

A. That the mandate issued April 5, 1975 by this Court be recalled.

B. That the language of the mandate be changed, altered or modified to conform to the order entered January 29, 1975.

C. That appellee may have such further relief as this Court deems proper.

/s/ WILLIAM HENNING RUBIN
William Henning Rubin
Attorney for Defendant-Appellee

APPENDIX B

STATE OF ILLINOIS
COUNTY OF COOK

AFFIDAVIT

WILLIAM HENNING RUBIN, counsel for B. COLEMAN CORPORATION, defendant-appellant, on oath, says:

1. Upon receipt of a copy of the mandate from the Clerk of the Supreme Court of Illinois he contacted Clell Woods, Clerk of the Court, and interrogated him as to why the language of the mandate did not conform to the order of the Supreme Court rendered January 29, 1975, and the statement of the clerk was "I assumed that since the order entered January 29, 1975 recited that the Appellate Court erred in granting the stay order that the stay order was in full force and effect irrespective of the oral argument that questioned the stay order since a temporary injunction order dies at the end of the 10 day period.

Further affiant sayeth naught.

/s/ William Henning Rubin

SUBSCRIBED & SWORN to before
me this 16 day of September, 1975.
/s/ Lydia Rojas
Notary Public

(SEAL)

APPENDIX C

SALE OF EXCHANGE ACT

AN ACT in relation to the definition, licensing and regulation of the business of selling or issuing checks, drafts, money orders or other instruments for the transmission or payment of money or credit at multiple locations through agents, subagents or representatives, as a service or for a fee or other consideration, to provide for the administration of this Act, to provide penalties for the violation thereof and to make an appropriation therefor. Approved July 8, 1957. L. 1957, p. 1749.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

301. §1. Policy of act. The General Assembly has found and declares:

that checks, drafts and money orders are bills of exchange used in the transmission or payment of money or credit;

that such instruments are widely used by the public as a process of settling accounts or debts;

that sellers and issuers of such instruments receive, in the aggregate, large sums of money from the public;

that the public suffers when any default occurs in the payment of such instruments;

that there is a high degree of public interest in the integrity, experience and financial responsibility and reliability of those engaged in the various types of businesses dealing in such instruments which has long been recognized by the General Assembly by the adoption of laws regulating such businesses;

that the business of selling or issuing such instruments at multiple locations through agents, subagents, or repre-

sentatives is a business which affects the public interest and which is not presently subject to regulation, although businesses which sell or issue such instruments at a single location are licensed and regulated under "An Act in relation to the regulation of community currency exchanges and the operators and employees thereof, and to make an appropriation therefor" approved June 30, 1943, as amended;[1]

[1] Section 31 et seq. of this chapter.